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IN THE

Supreme Court of the United States

October Term, 1967

No. 614

CALCASIEU PAPER COMPANY, Inc.,
Petitioner,

vs.

CARPENTER PAPER COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

G. L. DeLacy,
City National Bank Building,
Omaha, Nebraska,
Ogden K. Shannon and John A. Kerr,
W. T. Waggoner Building,
Fort Worth, Texas,
Attorneys for Respondent.

Thompson, Walker, Smith & Shannon,
W. T. Waggoner Building,
Fort Worth, Texas,
Kennedy, Holland, DeLacy & Svoboda,
City National Bank Building,
Omaha, Nebraska,
Of Counsel.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

STATEMENT OF FACTS

Your Respondent respectfully shows the following:

On the 11th day of September, 1946, Petitioner instituted this suit in the District Court of the United States for the Northern District of Texas. Petitioner sued for the price of merchandise admittedly received. Respondent filed its Counterclaim to recover damages sustained by it because of the breach and repudiation of a contract entered into by and between the parties wherein Petitioner

had agreed with Respondent to sell and deliver to Respondent 2,500 tons of kraft paper during the year 1946. The amount sued for by Petitioner represented only certain shipments made under said contract in the month of June of the same year. Respondent sought to recover its damages, allowing Petitioner full credit thereon in the amount sued for by Petitioner.

In the lower Court Petitioner filed a Motion to Dismiss. At the hearings allowed, Petitioner contended that the contract set forth in the Counterclaim was unenforceable. It asserted that the price was not definitely fixed in the contract and that therefore the contract was uncertain and void. This was not the reason given for the repudiation of the contract by Petitioner.

AMENDED COUNTERCLAIM

(Note: In analyzing and setting forth the Amended Counterclaim, we have copied from our Brief filed in the United States Circuit Court of Appeals for the Fifth Circuit. The word "Appellant" used therein refers to the Respondent herein and the word "Appellee" refers to Petitioner herein.)

This Counterclaim which was dismissed alleges:

1) That during the years 1945 and 1946 and for many years prior thereto, appellant was engaged in the wholesaling and jobbing of paper and paper products, including kraft paper, having branch houses in 14 cities and 6 states. The appellee during the same period was engaged in the manufacture of kraft paper with its plant and office in Elizabeth, Calcasieu Parish, Louisiana.

2) That in December, 1945, the parties acting through their proper officers entered into a contract at Elizabeth, Louisiana, for the sale and purchase of 2,500 tons of kraft paper to be sold and delivered by appellee to appellant

and to be received and accepted by appellant during the year 1946. Included in this contract was an agreement that the paper would be delivered to appellant's various branch houses according to orders placed with appellee under quarterly allotments by appellant's home office to its branch houses out of the annual commitment of 2,500 tons. That during each quarter under such orders and allotment, one-fourth of the paper contracted for the year would be delivered at the rate of 210 tons per month. Exhibit "A" attached to the Counterclaim is the allotment made by appellant to its various divisions. The Counterclaim alleges that the price of kraft paper since the year 1942 had been regulated by the Office of Price Administration of the United States Government. That the Government had fixed a maximum price which could be charged for kraft paper by a manufacturer similar to appellee. It is alleged that at the time the contract was entered into a maximum price had been fixed and it is alleged that it was agreed that the price which appellant was to pay for the paper was a price agreed upon between the parties which was the maximum price allowed and permitted by the regulations of the Office of Price Administration, and it is alleged that these figures were ascertainable and were familiar to both parties, and it is alleged that this price so agreed upon was to obtain between the parties during the year 1946. The Counterclaim alleges that during the four quarters of the year 1946 there was a maximum price fixed by the United States Government which covered the product involved; that this price was fixed by Maximum Price Regulation Number 182, which was dated July 23, 1942, and was amended on January 7, 1944. That this regulation was well known to the paper trade and was well known to both appellant and appellee. That commencing with January, 1946, appellee shipped paper to appellant as per the quarterly allotments to its

various divisions, and the price paid for the paper was a price which was equal to the maximum price allowed by the Office of Price Administration. Under the agreement the paper was to be loaded into railway cars at appellee's plant and billed to appellant under open bills of lading.

3) The Counterclaim alleges that approximately one-half of the paper contracted for was shipped. It alleges that at a time when appellant was not in any wise in default but had fully complied with its contract, appellee breached its contract and wrote a letter dated June 1, 1945, to appellee at Omaha, Nebraska, as follows.

"CALCASIEU PAPER CO., Inc.,
Manufacturers of Kraft Paper,
Elizabeth, Louisiana.

Edw. K. Ahrens,
Sales Manager.

June 1, 1946.

Carpenter Paper Company,
815-823 Harney Street,
Omaha 8, Nebraska.

Gentlemen:

This is to advise that effective today, the stock control of Calcasieu Paper Co., Inc., was sold by its former owners. The purchasers plan to use the product of the mill themselves. It is therefore with regret that we advise you that we will not be able to supply you with any more paper.

We want you to know that our long years of association have been most pleasant, and we deeply appreciate the business with which you have favored us.

Yours very truly,

CALCASIEU PAPER CO., Inc.,
(sgd.) C. L. GLASGOW,
President.

CLG:TJM"

It is alleged that thereafter appellant demanded of appellee that it comply with its contract, but it is alleged that appellee persisted in its stand taken in the letter of June 1, 1946, and failed to furnish or ship kraft paper to appellant or any of its branches, and it is alleged that this was in violation of its contract. Appellant alleges that it offered to pay the amount sued for in appellee's petition and offered to allow appellee to make shipments C. O. D. (the very invoices sued on showed that the terms upon which the paper was shipped were "2 per cent 30 days").

4) The Counterclaim further alleges that appellant attempted to obtain the paper elsewhere but because of the scarcity was unable to obtain said paper. The Counterclaim alleges that appellee knew that appellant had customers relying upon it for paper to be used in their trade; that appellee knew that the contract was entered into to protect appellant's customers. The Counterclaim with great particularity sets forth the damages sustained by appellant as a direct result of the breach. It sets forth appellant's loss of profits. It is not necessary to further analyze the allegations setting forth the appellant's damages as no claim was made in the lower Court that the damages were not properly pleaded.

5) The Counterclaim alleges that appellee was not prevented by fire, strikes or other causes beyond its control from completing the contract. It further alleges that appellee's plant produced during the year 1946 paper in excess of the amount which it was obligated to ship to appellant. The Counterclaim alleges that appellee's breach of contract was in bad faith and was intentional with design on its part and for its own selfish purpose, i. e., its new owners, to obtain the use of the kraft paper involved. (Par. XII of Amended Counterclaim, T. R. 91.)

6) Appellant in its Counterclaim prayed the Court to enter an order directing appellee to specifically perform its agreement and appellant prayed that a mandatory injunction be issued directing appellee to deliver the balance of the paper to appellant and, in the alternative, appellant prayed that it have judgment against appellee for a sum in excess of the amount sued for in appellee's petition.

Appellee below and Petitioner herein asserted that the price to be paid as alleged was not certain. It appears as alleged that there had been a maximum price fixed by the Office of Price Administration since 1942. Such price was in force during all quarters of the year 1946 and was in force in December, 1945, when the contract was entered into and was in force in June, 1946, when the contract was repudiated by the Petitioner herein. The Petitioner in the lower Court sought to make a point of the fact that the Emergency Price Control Act and Stabilization Act were suspended for a few days after June 30, 1946. However, by the Act of July 25, 1946, Congress reinstated the Act and made it retroactive to June 30, 1946 (see Sections 17-18 of the Price Control Extension Act of 1946), being Public Law No. 548, 79th Congress, 2nd Session.

CONTRACT PRICE CERTAIN

The price agreed upon between the parties themselves was the price which was the same as the price fixed by the Office of Price Administration, it being the maximum price fixed by that body. That price was agreed upon as between the parties as the price to be paid. The price was easily obtainable. The contract was entered into in Louisiana.

In the case of *Brown v. City of Shrevesport* (C. C. A. La. 2), 15 So. (2) 234, paragraph 1 of the syllabus is as follows:

> "Under statute requiring the price of a sale to be certain, that which may be made certain in a sale contract is certain. Civ. Code, Arts. 2439, 2464."

See also:

Gallaspy v. A. J. Ingersoll & Co. (S. Ct. La.), 84 So. 570.

Lee Lumber Co. v. Hotard (S. Ct. La.), 48 So. 286.

The Amended Counterclaim alleges that the Petitioner agreed to furnish 2,500 tons of kraft paper for the year 1946, but it was to be shipped in quarterly allotments as per Exhibit "A", which was attached to the Amended Counterclaim filed by Respondent. This Exhibit "A" is on page 8 of the Supplemental Record.

It is likewise alleged that the shipments were to be at the rate of approximately 210 tons per month. The price agreed upon between the parties was the maximum price fixed by the Office of Price Administration. Up until some time in November there was an O. P. A. price fixed during each quarter of the year. The O. P. A. price was the maximum price and was fixed and in force at the time the contract was entered into, at the time approximately one-half of the contract was completed, at the time the Petitioner repudiated the contract in writing, during the third quarter of the month and at the end of the third quarter of the month and during the fourth quarter of the month up until the end of the O. P. A. in November, 1946.

At the time the lawsuit was brought by Petitioner in September, 1946, the maximum price referred to was

in effect. As a matter of fact, when this Petitioner repudiated the contract it never mentioned or claimed that the price was uncertain, and that idea was never heard of, at least by this Respondent, until the Motion to Dismiss in the lower Court was filed by Petitioner. Then the whole Counterclaim was summarily dismissed and judgment entered for the Petitioner on the pleadings.

We believe that the Amended Counterclaim stated a good cause of action and that Paragraph 2 of the syllabus in the Circuit Court of Appeals correctly states the law applicable (164 F. (2) 653).

It should be remembered that this case went off on a Motion to Dismiss. The Motion to Dismiss was merely a general motion. It did not even give any reasons for the dismissal. It simply stated that the Amended Counterclaim did not state a claim upon which relief could be granted.

The New Rules do not contemplate such a motion and certainly do not contemplate that such a Counterclaim as filed by the Respondent be summarily disposed of on a motion.

Supplement to Moore's Federal Practice, Vol. 1, p. 168.

Komer v. Shipley (C. C. A. 5), 154 F. (2) 861.

Kohler v. Jacobs (C. C. A. 5), 138 F. (2) 440.

Dennis v. Village of Tonka Bay (C. C. A. 8), 151 F. (2) 411.

Fleming v. Wood-Fruitticher Grocery Co. (N. D., Ala.), 37 F. Supp. 947.

Reynolds International Pen Co. v. Eversharp (U. S. D. C., Del.), 5 F. R. D. 382.

As was well said by Judge Clark in the case of *Diogardi v. Durning* (2 Cir.), 139 F. (2) 774:

> "Here is another instance of judicial haste which in the long run makes waste."

The Respondent had a valid contract with Petitioner. The Petitioner, having furnished about half the requirements under the contract, repudiated the contract because the control stock of the corporation was purchased by people desiring to use the paper themselves; so they selfishly and unlawfully refused to perform, to the tremendous disadvantage and damage of Respondent. The Petitioner was the source of Respondent's supply. Respondent was unable to go out in the market and purchase this paper. All of this the Petitioner knew but because the new owners could use the paper, they wilfully and in bad faith, as alleged in the Amended Counterclaim, breached the contract.

PETITIONER'S REASONS GIVEN IN SUPPORT OF APPLICATION FOR WRIT

I.

In Reason Number 1, Petitioner asserts that important questions of Federal law are involved which have not been decided by this Court.

> There was a contract. The parties agreed between themselves that the price to be paid was the price established by the Office of Price Administration. This was the measuring stick. There was such a price actually fixed by the Office of Price Administration. It was in force at the time the contract was repudiated by Petitioner; it was in force at the time the suit was brought, and it was in force during

all quarters of the year 1946, during which time the Petitioner on a quarterly basis was to furnish 2,500 tons of kraft paper.

II.

Petitioner asserts that the effect of the retroactive provision of the Price Control Extension Act of July 25, 1946, is a question that should be decided by this Court.

The Petitioner had complied with the contract during the first two quarters; it had up until the end of September to comply with the allotment for the third quarter. The price fixed by the Office of Price Administration was in force during the third quarter and was in force at the end of the third quarter. It likewise was in force during a part of the fourth quarter and up until some date in November. There was a period from June 30 to July 25, 1946, when the original Emergency Price Control Act of 1942 was not in force, but the Price Control Extension Act of July 25, 1946, provided that the provisions of the Act should take effect as of June 30, 1946, and provided that all price schedules under the Emergency Control Act of 1942, with certain exceptions not pertinent, and under the Stabilization Act of 1942, as amended, which was in effect on June 30, 1946, should be in effect as if the Acts had been enacted on June 30, 1946. The Act provides that it shall be effective in the same manner and to the same extent as if the Act had been enacted on June 30, 1946. As has been said before, the contract required that the 2,500 tons of kraft paper be furnished as per quarterly allotments and during each quarter the maximum price for the kraft paper as fixed by the Office of Price Administration was in force.

III.

Petitioner alleges a conflict between the decision in the Circuit Court of Appeals and the decision in the case of *Ross Lumber Co. v. Hughes Lumber Co.*, 264 Fed. 757.

It is apparent from an examination of this case that it is not at all in point. In this case the defendant contracted to sell and the plaintiff to buy a designated quantity of pine boards, the price to vary according to a calculation based upon the market price as established by semi-monthly "concession sheets," which were issued by one who was recognized generally by pine lumber dealers as an authority on the market price of such lumber. The government subsequently fixed a maximum price for the commodity which was less than the price as calculated according to the last concession sheet, the publication of which was discontinued during the war. An action was brought to recover damages on account of defendant's refusal to perform the contract after the establishment of the government price. The trial Court directed a verdict for the defendant. The Court stated that the term "market price" mentioned in the contract should be the price calculated from the concession sheets which were based on actual sales and that subsequently the substitution of the government price entitled either party to refuse longer to perform. The lower Court overruled the plaintiff's contention that the term "market price" included the price fixed by the government. Paragraph 1 of the syllabus of the case is as follows:

> "A contract for the sale of lumber at prices varying from time to time to conform to a specified price list was abrogated, where the government fixed a maximum price, less than that fixed

by such list, and the publishers ceased publishing the list, as the criterion upon which the price depended ceased to exist without fault of either party, and, though the contract was construed as a sale at the market price, the price fixed by the government was not a market price such as was contemplated."

It is very difficult for us to find out why the Petitioner thinks this case is in point. In the cited case they had agreed that the price was to be fixed by certain concession sheets which were based on actual sales. The use of these concession sheets was discontinued. The government fixed a maximum price which was less than the price established by the semi-monthly concession sheets where the parties had agreed that the price should be that established by the concession sheets. Along comes the government and establishes a maximum price below this price. In the case at bar it was agreed between the parties that the maximum price as established by the government should be the price as between the parties. The government did fix a maximum price. This maximum price was in effect in 1946 and in June, 1946, at the time the Petitioner wrote the letter repudiating the contract and throughout the entire third quarter of 1946. On June 30, 1946, the Act involved expired but on July 25, 1946, it was re-enacted (as it had been before) as of the date of June 30, 1946, and continued to November 10, 1946. But the present owners of the Petitioner, who had bought the control stock prior to June 1, 1946, took the positive stand on that day that they would not furnish any additional kraft paper and did not furnish any during the third and fourth quarters of 1946, not on the ground that they didn't have a contract, but on the ground that they wanted to use the paper themselves.

IV.

Petitioner alleges that the lower Court's decision was in conflict with a decision of the Sixth Circuit in the case of *Louisville Soap Co. v. Taylor*, 279 Fed. 471.

This was an action brought by Taylor and others against the Louisville Soap Company to recover damages against a breach of contract. The defendant filed a cross-petition to recover overpayments made by it. The decision involves the cross-petition. The decision of the contract governing the price is as follows:

> "To be 50c per 280 lbs. over the official closing Savannah, Ga., market on date order is received at Mobile, Ala. In the event of two closing prices, the average is to apply."

The discussion in the opinion is mostly given up with the question of the amount contracted for. It was the claim of the Soap Company that for the last two months covered by the contract during which some of the products should have been ordered, there was no market on the Savannah Board of Trade, official or otherwise, and there was no way of fixing the price, therefore the contract must fail for this period of the contract. The Court stated that both parties understood that the official closing of the Savannah market mentioned in the contract meant the posted official closing of the Savannah Board of Trade which was an organization of the naval stores trade controlled by those interested in the rosin and turpentine business. Under the by-laws of that organization, the naval stores quotation committee is composed of three factors and three buyers. It appeared that there were no sales of any rosin of any grade made upon the market between January 22nd

and April 11th. The Court found that during that period there was no closing price in that market. The price during that period was to be the official closing Savannah market which was intended to be the official closing price posted by the Savannah Board of Trade. The Court stated that under the rules the official price could be determined only by actual transactions between factors and buyers and the Court stated that during the last two months of the contract there was no sales on which the closing price could be based, the Court stating that there was no closing price within the meaning of the contract but found that the committee was unauthorized to post any closing price. The Court stated:

> "From the uncontradicted evidence in this case the conclusion necessarily follows that, under by-law 15 of the Savannah market, the quotation committee was not authorized to post an official closing price when there was no reasonable basis upon which to post quotations; that after January 27th, until April 11th, the fact, as declared by the committee, that there was 'nothing doing,' followed by the immaterial change to 'nominal,' demonstrates that there was no reasonable basis on which to post quotations; that the price posted by the quotation committee during this time was not the closing price on either of these days; that the quotations posted did not reflect the true and actual condition of the market as to price from January 27th until April 11th, and did not reflect the true and actual condition of the market as to either tone or price after February 24th until April 11th; that at the time of the execution of the contract sued upon the contracting parties did not contemplate the fixing of prices by the quotation committee on any basis other than the actual transaction between

> factors and buyers, nor did they contemplate any such long-continued anomalous condition of the Savannah market as would prevent the quotation committee from fixing a price, based upon actual transactions, that would at all times reflect the true and actual condition of the market price; that from the 27th day of January, 1919, there was no 'official closing Savannah, Ga., market,' within the meaning of the contract, upon any day subsequent to that date until after the end of the year covered by the contract, March 31, 1919; that from and after January 27, 1919, the provision in the contract as to price fails, because indefinite and uncertain, and no longer possible of ascertainment by the means or method provided in the contract or in any other way."

It thus appears in this case that during the period involved there was no closing price in existence and that there was, therefore, no way of determining the price of the product delivered on the dates involved. In the case at bar, as we have said before, the parties agreed that the maximum price fixed by the Office of Price Administration as the maximum price was the price agreed upon between the parties as the price to be paid for the paper. This price was in effect in the months of June, July, August, September, October and beyond that. The suit was filed in September, 1946. The Petitioner had completely repudiated their contract on June 1, 1946, and persisted in that position at all times and, as has been said before, they did not do this on the ground that the price was indefinite or the amount was indefinite but they did it on the ground that they desired to use their paper themselves. The Respondent had given the Petitioner instructions for the shipment of the entire amount due during the year 1946 and had given it quarterly al-

lotments. These are set forth in Exhibit A attached to the Respondent's Counterclaim and are contained in the supplemental record, page 8. The Petitioner was in the process of complying with the first half of the contract when it positively advised the Respondent that it would ship no more paper, as the new owners were going to use the paper themselves. At that time the paper was in process of being manufactured, at that time there was a maximum price in existence fixed by the Office of Price Administration. This price was by virtue of the original Act and the Price Control Extension Act of 1946 continued in force until way up into November. There was, therefore, a maximum price in existence available to the parties.

V.

Petitioner alleges that the decision of the lower Court is in conflict with the decision of the Sixth Circuit in the case of *Canadian National Ry. Co. v. Geo M. Jones Co.*, 27 F. (2) 240. We are likewise of the opinion that this case is not at all pertinent.

In this case the coal company and the railroad company entered into a contract on November 25, 1921, for the sale to the railway company of 150,000 tons of run of the mine coal from a certain district, deliveries to commence April 1, 1922. Deliveries were to continue in installments throughout the year and end March 31, 1923. The question arises as to the price. The contract provided that the price should be the same as paid seller by other railroads on contract for mine run coal from the Hocking District at the time that this contract became effective. The contract was to become effective April 1st but at that

time the coal company had no contracts with other railroads due to a general strike of coal miners. This strike was continued until August 22, when it was adjusted. Thereafter, the parties got together and in a letter addressed to the coal company dated September 29, 1922, there was a provision for the commencement of deliveries to be billed at the rate of $3.50 net ton. The terms of the letter were accepted by the coal company. After the strike a contract was also entered into with the New York Central lines covering the shipment of 250,000 tons between the six months from October 1, 1922, to April 1, 1923, at a price of $3.00 per net ton. In November and December of 1922 the price of coal dropped and the same coal company entered into a contract with another railroad for $2.65 per ton. The Court found that the original agreement contemplated that the price should be the same as paid the seller by other railroads under contract April 1, 1922, when the deliveries were to commence. The Court said there were no contracts on that date. The railroad suggested that the original contract was binding up until the time the coal company entered into a contract with the New York Central Lines notwithstanding that it had entered into an absolute contract itself with the coal company on September 29, 1922. The Court held that the fixing of the price by the latter contract at $3.50 per ton was not the fixing of a tentative price but was the determination of the final and ultimate price for the purpose of the contract which was thus revived and made effective. The Court stated that the railroad company continued to receive the coal and pay $3.50 per ton, that nothing indicated that the price was tentative and that there was no claim of

that until after the decline of coal prices and until after the letter of the coal company offering a certain refund in the price in the event of extension in the contract and the sale of additional tonnage. The Court stated that the practical interpretation of the contract by the parties presents one of the most satisfactory tests of true construction to be applied.

These are the cases which the Petitioner claims are in conflict with the decision of the Circuit Court in this case. It is apparent from an analysis of the cases that they are not in conflict, and it can almost be said that they are not even pertinent or in point.

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CONCLUSION

We submit that the legal questions involved are those of simple contract law and that no Federal question is involved. We likewise assert that there was no conflict between the decisions of any of the Circuit Courts of Appeal and that there is no conflict between the decision and the Louisiana decisions. Petitioner filed a Complaint; Respondent filed an Answer and Counterclaim. The District Court on a simple Motion to Dismiss summarily dismissed the Amended Counterclaim, and then on an oral motion for judgment on the Complaint, entered judgment on the Complaint against the Respondent. Surely the New Rules do not contemplate such a summary disposal of a case as this.

Respondent respectfully requests that Petitioner's Petition for Writ of Certiorari be denied.

Respectfully submitted,

G. L. DeLacy,
City National Bank Building,
Omaha, Nebraska,

Ogden K. Shannon and John A. Kerr,
W. T. Waggoner Building,
Fort Worth, Texas,
Attorneys for Respondent.

Kennedy, Holland, DeLacy & Svoboda,
City National Bank Building,
Omaha, Nebraska,

Thompson, Walker, Smith & Shannon,
W. T. Waggoner Building,
Fort Worth, Texas,
Of Counsel.